UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

WESLEY HALE, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner, Social Security Administration, Defendant.	No. SACV 08-1310 CW DECISION AND ORDER

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner's denial of disability benefits. As discussed below, the court finds that the Commissioner's decision should be reversed and this matter remanded for payment of benefits.

I. BACKGROUND

Plaintiff Wesley Hale was born on December 9, 1976, and was thirty years old at the time of his administrative hearing. [Administrative Record ("AR") 16, 47.] Plaintiff has a high school education and past relevant work as a warehouse attendant, bouncer,

and grocery bagger. [AR 39-40.] Plaintiff alleges disability on the basis of back problems and diabetes. [AR 50.]

II. PROCEEDINGS IN THIS COURT

Plaintiff's complaint was lodged on November 18, 2008, and filed on November 25, 2008. On May 14, 2009, Defendant filed an answer and Plaintiff's Administrative Record ("AR"). On October 9, 2009, the parties filed their Joint Stipulation ("JS") identifying matters not in dispute, issues in dispute, the positions of the parties, and the relief sought by each party. This matter has been taken under submission without oral argument.

III. PRIOR ADMINISTRATIVE PROCEEDINGS

Plaintiff applied for a period of disability and disability insurance benefits ("DIB") under Title II of the Social Security Act on April 25, 2006, alleging disability since April 19, 2005. [AR 9.] After the application was denied initially and on reconsideration, Plaintiff requested an administrative hearing, which was held on November 28, 2007, before Administrative Law Judge ("ALJ") Charles E. Stevenson. [AR 16.] Plaintiff appeared without counsel,[1] and testimony was taken from Plaintiff and vocational expert Joseph Torres. [AR 17.] The ALJ denied benefits in a decision issued on January 25, 2008. [AR 9-15.] When the Appeals Council denied review on September 25, 2008, the ALJ's decision became the Commissioner's final decision. [AR 1-3.]

[1] Plaintiff stated at the beginning of the hearing that he was unrepresented because he did not have funds to pay an attorney. [AR 18.] The ALJ informed Plaintiff that Social Security plaintiffs' attorneys typically work on contingency basis, provided the name of a legal services agency, and asked Plaintiff twice whether he would like to proceed with an attorney. [AR 19-22.] Plaintiff elected to remain unrepresented at the hearing, stating that he had already submitted all relevant medical records. [AR 20, 22.]

IV. STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The Commissioner's (or ALJ's) findings and decision should be upheld if they are free of legal error and supported by substantial evidence. However, if the court determines that a finding is based on legal error or is not supported by substantial evidence in the record, the court may reject the finding and set aside the decision to deny benefits. See Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v. Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick v. Chater, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, a court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Id. "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Reddick, 157 F.3d at 720-721; see also Osenbrock v. Apfel, 240 F.3d at 1162.

V. DISCUSSION

A. THE FIVE-STEP EVALUATION

To be eligible for disability benefits a claimant must

demonstrate a medically determinable impairment which prevents the claimant from engaging in substantial gainful activity and which is expected to result in death or to last for a continuous period of at least twelve months. Tackett v. Apfel, 180 F.3d at 1098; Reddick v. Chater, 157 F.3d at 721; 42 U.S.C. § 423(d)(1)(A).

Disability claims are evaluated using a five-step test:

> Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.
> Step two: Does the claimant have a "severe" impairment? If so, proceed to step three. If not, then a finding of not disabled is appropriate.
> Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If so, the claimant is automatically determined disabled. If not, proceed to step four.
> Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.
> Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett v. Apfel, 180 F.3d at 1098-99; 20 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or "not disabled" at any step, there is no need to complete further steps. Tackett v. Apfel, 180 F.3d 1098; 20 C.F.R. § 404.1520.

Claimants have the burden of proof at steps one through four, subject to the presumption that Social Security hearings are non-adversarial, and to the Commissioner's affirmative duty to assist claimants in fully developing the record even if they are represented by counsel. Tackett v. Apfel, 180 F.3d at 1098 and n.3; Smolen v. Chater, 80 F.3d at 1288. If this burden is met, a prima facie case of

disability is made, and the burden shifts to the Commissioner (at step five) to prove that, considering residual functional capacity ("RFC")[2], age, education, and work experience, a claimant can perform other work which is available in significant numbers. Tackett v. Apfel, 180 F.3d at 1098, 1100; Reddick v. Chater, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE

Here, the ALJ found that plaintiff had not engaged in substantial gainful activity since the alleged disability onset date (step one); that plaintiff had "severe" impairments, namely degenerative disc disease of the lumbar spine and non-insulin-dependent diabetes mellitus (step two); and that plaintiff did not have an impairment or combination of impairments that met or equaled a "listing" (step three). [AR 11.] The ALJ determined that Plaintiff had an RFC for light work with limitations to occasional climbing, kneeling, bending and stooping, and restrictions from climbing ladders, working at unprotected heights, and being around hazardous equipment. [AR 12.] The vocational expert testified that a person with Plaintiff's RFC and other vocational factors could perform Plaintiff's past relevant work as a bouncer, as it is generally performed in the national economy (step four). [AR 14-15.] Accordingly, Plaintiff was found not "disabled" as defined by the Social Security Act. [AR 15.]

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[2] Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to work without directly limiting strength, and include mental, sensory, postural, manipulative, and environmental limitations. Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

C. ISSUES IN DISPUTE

The parties' Joint Stipulation identifies four disputed issues:

1. Whether the ALJ properly considered the opinion of Plaintiff's treating physician, Dr. Anne Ford;
2. Whether the ALJ properly considered the opinion of Plaintiff's treating neurologist, Dr. Bradley Noblett;
3. Whether the ALJ properly considered the opinion of Plaintiff's treating orthopedist, Dr. Raed Ali; and
4. Whether the ALJ properly considered whether Plaintiff's impairments met or equaled the requirements of a listed impairment.

[JS 2-3.]

As discussed below, Issue Two is dispositive.

D. DR. NOBLETT

In his second claim, Plaintiff asserts that the ALJ did not properly account for the opinion of Dr. Bradley Noblett, a neurological surgeon who twice saw Plaintiff, in June and November 2007, for complaints of back problems. [JS 9-10; AR 228, 230-32.]

Background

At the hearing, Plaintiff testified that he injured his back in a gardening accident, apparently on or around his alleged disability onset date of April 19, 2005. [AR 27.] At the time of the injury, Plaintiff had worked for several years at a distribution center for Ford Motor Company as a warehouse attendant, which involved lifting and carrying car parts from a warehouse to a dock. [AR 26.] Plaintiff was no longer able to perform his job at Ford, and he received a buyout from the company. [AR 28.] Plaintiff has not worked since the injury. [AR 11.]

According to the medical record, Plaintiff began receiving ongoing treatment from Dr. Anne Ford to address his lower back pain since the time of the injury. [AR 136-72.] Plaintiff's initial treatment included pain killers and physical therapy. [Id.; AR 178-82.] In August 2006, Dr. Ford wrote a letter stating, among other things, that Plaintiff "is limited to lifting less than five pounds or he has significant back pain and spasm." [AR 194.]

In June 2007, Dr. Ford arranged for Plaintiff to have an MRI of the lumbar spine and referred Plaintiff to an examination by Dr. Noblett. [AR 230-34.] A record of the MRI indicated an impression that Plaintiff had mild degenerative disc disease most notable at the L4-5 disc, level with moderate to severe left neural foraminal narrowing, and that the test result was stable in comparison with a similar study taken in May 2006. [AR 233-34.] Dr. Noblett, in his examination, initially noted that Plaintiff's "symptoms have persisted and remain present on a daily basis and quite aggravating." [AR 230.] Dr. Noblett also noted that Plaintiff had been seen previously by an orthopedic spine surgeon to discuss "potential operative interventions." [Id.; see AR 222-23 (examination by Dr. Gerald Alexander on October 27, 2006).] In reference to the MRI, Dr. Noblett stated that the test showed, "most notably, I believe, a left L4-5 intra and extraforaminal disc protrusion, in other words a far lateral disc protrusion that is likely compromising the existing L4 nerve root." [AR 231.] As a recommendation to address the impairment, Dr. Noblett gave the opinion that

> Though much time has passed and it is less clear how successful he would be, even with a surgical undertaking, I believe his options are physical therapy which he has tried and failed,

> epidural steroid injections which I would be unlikely to recommend, not simply because of his diabetes but due to suggesting that he will not heal or improve spontaneously and finally the option of surgical resection of the disc through an extraforaminal approach.
>
> Notwithstanding the amount of time that has passed, I think the odds are reasonably good that he would glean some benefit from a decompression of that nerve root, though not necessarily be cured.
>
> [AR 231.]

Dr. Noblett further noted that Plaintiff "is unable to perform any form of manual or physical labor" such as he performed at Ford, and that Plaintiff was not currently considering surgical intervention, but that "I would be happy to discuss further with him the option of a surgical discectomy." [AR 232.]

Based on the findings of Dr. Noblett's examination, Dr. Ford wrote another letter in October 2007, stating, among other things, that in her opinion, "I do not believe Wesley is capable of working in any field with any physical work of which he has been trained to do." [AR 227.]

One month later, in November 2007, Dr. Noblett saw Plaintiff again. [AR 228.] Dr. Noblett initially observed that Plaintiff was "doing quite a bit worse than our last visit in June 2007" and that "Plaintiff initially chose to be treated conservatively, but returns today, doing quite a bit worse." [Id.] Dr. Noblett also observed that Plaintiff "ambulates only with difficulty and whether standing or sitting, is leaning dramatically over toward the right side, I suspect thereby decompression the impinged nerve root at the foraminal level."

[Id.] Dr. Noblett recommended that Plaintiff have another MRI and stated that, "My suspicions are that a surgical decompression or discectomy, whether from an intra or an extraforaminal approach would lead to significant clinical benefits, but that will be up to the patient to decide." [Id.] Dr. Noblett also stated that "I do not feel he is able to return to any form of work, as prolonged sitting, standing or movement tend to aggravate his symptoms." [Id.] At the hearing, held approximately three weeks later, Plaintiff testified that he was still in discussions with Dr. Noblett about the possibility of surgery. [AR 30.]

The Administrative Finding

In the administrative decision issued on January 25, 2008, the ALJ stated that the medical evidence indicated, with respect to Plaintiff's treatment recommendations, that, "Surgical intervention has been discussed, but there is no indication that any physician was proceeding in that direction. Instead, exhaustion of non-operative modalities have been encouraged." [AR 13.] With respect to Dr. Noblett's opinion in particular, the ALJ stated that both Dr. Ford and Dr. Noblett's conclusion that Plaintiff was disabled was offered "within the context of workers compensation that the claimant cannot return to his highly exertional job as a warehouse attendant." [AR 14.] The ALJ also noted that Plaintiff has received conservative care, "which is contraindicative of the severe, debilitating conditions alleged by the claimant, or with the restrictions against even sedentary work." [Id.] Accordingly, Dr. Noblett's opinion was apparently given no weight.

Discussion

Ninth Circuit cases distinguish among the opinions of three types

of physicians: those who treat the claimant (treating physicians), those who examine but do not treat the claimant (examining or consultative physicians), and those who neither examine nor treat the claimant (non-examining physicians). Lester v. Chater, 81 F.3d at 830. The opinion of a treating physician is given deference because he is employed to cure and has a greater opportunity to know and observe the patient as an individual. Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987). The opinion of the treating physician, however, is not necessarily conclusive as to either physical condition or the ultimate issue of disability. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989), Rodriguez v. Bowen, 876 F. 2d 759, 761-62 & n.7 (9th Cir. 1989). "'The administrative law judge is not bound by the uncontroverted opinions of the claimant's physicians on the ultimate issue of disability, but he cannot reject them without presenting clear and convincing reasons for doing so.'" Reddick v. Chater, 157 F.3d at 725. (quoting Matthews v. Shalala, 10 F.3d 678, 780 (9th Cir. 1993)(quoting Montijo v. Secretary of Health & Human Servs., 729 F.2d 599, 601 (9th Cir. 1984). Even if a treating physician's opinion on disability is controverted, it can be rejected only with specific and legitimate reasons supported by substantial evidence in the record. Lester v. Chater, 81 F.3d at 830; see also Benecke v. Barnhart, 379 F.3d 587, 591 & n.1 (9th Cir. 2004).

In this case, the rejection of Dr. Noblett's opinion did not meet this standard. The conclusions reached in the ALJ's decision that there was no indication that any physician was proceeding in the direction of surgical intervention and that Plaintiff's physicians had chosen to give him only conservative treatment are clearly refuted by the record. Dr. Noblett's opinion, the most recent medical opinion

evidence in the record, established that prior conservative treatment options had been exhausted and unsuccessful, that it was Plaintiff's choice to proceed conservatively, that Dr. Noblett believed such treatment options were of doubtful future benefit, and that surgical intervention would probably lead to a significant clinical benefit if Plaintiff decided to pursue that option upon review of a new MRI. [AR 228, 230-32.] The record does not support the interpretation that Plaintiff was limited to conservative treatment because of a perception that his impairment was not serious or that more aggressive treatment options such as surgery were not seriously considered. Accordingly, specific and legitimate reasons based on substantial evidence in the record were not provided to discount Dr. Noblett's opinion, and reversal on the basis of this issue is required. Lester v. Chater, 81 F.3d at 830.

E. REMAND FOR PAYMENT OF BENEFITS

The decision whether to remand for further proceedings is within the discretion of the district court. Harman v. Apfel, 211 F.3d 1172, 1175-1178 (9th Cir. 2000). Where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find the claimant disabled if all the evidence were properly evaluated, remand is appropriate. Id., 211 F.3d at 1179. However, where no useful purpose would be served by further proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. Id. (decision whether to remand for further proceedings turns upon their likely utility).

Here, as set out above, specific and legitimate reasons supported

by substantial evidence in the record were not provided to reject Dr. Noblett's opinion; accordingly, it is credited as true. Harman v. Apfel, 211 F.3d at 1178; Lester v. Chater, 81 F.3d at 834. Specifically, Dr. Noblett stated that from a functional standpoint, Plaintiff is precluded from prolonged sitting, standing or movement. [AR 228.] During the administrative hearing of November 28, 2007, the vocational expert testified that a limitation to very short periods of sitting, standing and walking would preclude Plaintiff from performing his past relevant work or other work in the national economy. [AR 41-42.] Accordingly, the existing record mandates a finding of disability. See Harman v. Apfel, 211 F.3d at 1180 (citing cases where award of benefits was directed when there was vocational expert testimony that the limitations established by improperly discredited medical evidence would render claimant unable to work). Under these circumstances, remand for payment of benefits is appropriate.

VI. ORDERS

Accordingly, **IT IS ORDERED** that:

1. The decision of the Commissioner is **REVERSED**.

2. This action is **REMANDED** to defendant for payment of benefits.

3. The Clerk of the Court shall serve this Decision and Order and the Judgment herein on all parties or counsel.

DATED: November 17, 2009

_____/S/_____
CARLA M. WOEHRLE
United States Magistrate Judge